IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

JOHNNY C. FENN, JR., #238558	)	
	)	
Plaintiff,	)	
	)	**Civil Action No.: CV-05-515-F**
v.	)	
	)	
MIKE HUGHES, et al.,	)	
	)	
Defendants.	)	

SPECIAL REPORT

COME NOW the Defendants, Michael Hughes and James Mueller, and respectfully submit their Special Report pursuant to this Court's Order of June 15, 2005, and the Extension of Time granted July 26, 2005.

I. Introduction

The Plaintiff, currently an incarcerated convict, filed a Complaint claiming excessive force was used against him during an arrest. Plaintiff demands that charges for Assault in the Second Degree be dropped as well as compensatory and punitive damages.

The Plaintiff brings a claim for "police brutality", which Defendants construe as a claim of excessive force in violation of his rights under the Fourth or Fourteenth Amendment.

II. The Parties

a. The Plaintiff, Johnny Fenn, was sentenced on April 26, 2005 for Unauthorized Use of a Motor Vehicle, and two counts of Assault Second Degree. Pursuant to the Habitual Felony Offender Act, the court found that Fenn had previously been convicted of Possession of a Forged Instrument Second Degree, Possession of a Forged Instrument Second Degree, Fraudulent Use of a Credit Card, and Receiving Stolen Property. (See attached

Sentence Order dated April 26, 2005). He is currently incarcerated in the Bullock County Correctional Facility.

b. Mike Hughes is an Officer with the Troy Police Department. (See attached Officer Hughes' Continuing Education Documents).

c. Jim Mueller is an Officer with the Troy Police Department. (See attached Officer Mueller's Continuing Education Documents).

III. Facts

On October 3, 2004, Officers James Mueller and Michael Hughes, were dispatched to Pinckard's Convenience Store on Highway 231 south of Troy for a trespassing call involving the plaintiff, Johnnie Fenn. (See attached Affidavits of Officer James Mueller and Officer Michael Hughes; See also, attached Troy Police Department Investigation File). While they were in route, dispatch informed the officers that Fenn had an active felony warrant and that he was leaving Pinckard's in a silver minivan headed towards the Pocossin area. (See attached Affidavits of Officer James Mueller and Officer Michael Hughes). Officer Mike Hughes saw the van on Smith Road. (See attached Affidavit of Officer James Mueller). Officer Hughes met with the silver van, and it had two people in the van. (See attached Affidavit of Officer Michael Hughes). Officer Hughes turned around to see if Fenn was possibly in this van. (See attached Affidavit of Officer Michael Hughes). As Officer Hughes turned around, he met the van coming back out and it just had the driver in it at this time. (See attached Affidavit of Officer Michael Hughes). Officer Hughes followed the driver to a trailer and talked with him. (See attached Affidavit of Officer Michael Hughes). The driver was not Fenn. (See attached Affidavit of Officer Michael Hughes). The driver told Officer Hughes that he dropped Fenn off on Smith

Road. (See attached Affidavit of Officer Michael Hughes). Officer Hughes advised other officers of this. (See attached Affidavit of Officer James Mueller).

As Officer Mueller was headed towards Smith Road, Troy Police Sergeant Railey, the first shift supervisor, advised that he saw Fenn in a red/silver Ford SUV. (See attached Affidavits of Officer James Mueller and Officer Michael Hughes). Fenn jumped out of the vehicle and ran on foot into a wooded area. (See attached Affidavits of Officer James Mueller and Officer Michael Hughes). Officer Hughes, Officer Mueller and other law enforcement officers on the scene began setting up a perimeter, and Sergeant Railey advised that Fenn was possibly in one of three double-wide trailers in the back of the trailer park. (See attached Affidavit of Officer James Mueller and Officer Michael Hughes). Several Pike County deputies arrived on the scene in pursuit of Fenn. (See attached Affidavits of Officer James Mueller and Officer Michael Hughes). One of the sheriff's deputies saw Fenn sitting on a porch. (See attached Affidavit of Officer James Mueller). Fenn then ran into a heavily wooded area at the rear of the trailer park. (See attached Affidavit of Officer James Mueller and Officer Michael Hughes). Sergeant Railey advised the officers to spread out and told dispatch to request tracking dogs. (See attached Affidavits of Officer James Mueller and Officer Michael Hughes).

As Officer Mueller was setting up a perimeter, another law enforcement officer on the scene, Officer Ben Crawley called out that he was in foot pursuit of Fenn. (See attached Affidavit of Officer James Mueller). Officer Mueller got into his vehicle and drove to Officer Crawley's location. (See attached Affidavit of Officer James Mueller). As Officer Mueller arrived, Fenn was getting into a red Ford Econoline van. (See attached Affidavit of Officer James Mueller). Officer Crawley advised that Fenn had stolen the van. (See attached Affidavit of Officer James Mueller). At that point, Officer Mueller knew that Fenn was wanted on a felony warrant and that he had stolen a van. (See attached Affidavit of Officer James Mueller). Fenn was driving directly at Officer Mueller, and veered to his right, going off the road. (See attached Affidavit of Officer James Mueller). Officer Mueller called out "vehicle pursuit" over the radio. (See attached Affidavit of Officer James Mueller). Officer Mike Hughes and a Pike County deputy joined in the chase. (See attached Affidavit of Officer James Mueller). Officer Hughes was in front of the van, Officer Mueller was behind, and the deputy was to the left attempting to box the van in. (See attached Affidavit of Officer James Mueller). Fenn then intentionally rammed Officer Mike Hughes' vehicle in the rear and then ran off the right shoulder, hitting a mailbox. (See attached Affidavit of Officer James Mueller and Officer Michael Hughes).

Officer Hughes regained control and positioned himself on the left of Fenn's vehicle, with Officer Mueller directly behind him. (See attached Affidavit of Officer James Mueller). Fenn then swerved hard to the left intentionally ramming Officer Hughes' car in an attempt to either injure him or force him into the ditch. (See attached Affidavit of Officer James Mueller). Fenn then came back across the road and attempted to do the same to Officer Mueller, colliding with his car. (See attached Affidavit of Officer James Mueller and Officer Michael Hughes). At that time, Officer Hughes' vehicle was disabled, and Officer Mueller was directly behind Fenn as they turned South on U.S. Highway 231 headed towards Brundidge, Alabama. (See attached Affidavit of Officer James Mueller and Officer Michael Hughes). Because his vehicle had been disabled by Fenn, Officer Hughes could not go any further. (See attached affidavit of Officer Michael Hughes). The point in time Officer Hughes realized his car was disabled, he stopped and that was the last contact he had with Fenn. (See attached Affidavit of Officer Michael

Hughes). Officer Mueller continued to pursue Fenn down Highway 231 in the direction of Brundidge, Alabama. (See attached Affidavit of Officer Michael Hughes).

Officer Mueller backed off and allowed Sergeant Railey to take the lead, and he declared emergency traffic over the radio. (See attached Affidavit of Officer James Mueller). The Brundidge Police Department and the Alabama State Troopers were notified. (See attached Affidavit of Officer James Mueller).

Fenn continued south on Highway 231, and then turned left into a Chevron station. (See attached Affidavit of Officer James Mueller). Officer Mueller attempted to cut Fenn off, placing his vehicle at the exit. (See attached Affidavit of Officer James Mueller). Fenn turned straight at Officer Mueller and rammed his patrol car again. (See attached Affidavit of Officer James Mueller). Officer Mueller managed to turn his car enough so the impact was into the rear door instead of his driver's door. (See attached Affidavit of Officer James Mueller). Officer Mueller then continued the pursuit, as Fenn made several evasive turns into a residential area, cutting through one yard and coming out onto another street. (See attached Affidavit of Officer James Mueller). Officer Mueller was coming around the curve in pursuit of Fenn when units were notified that Fenn had collided head on with a Brundidge Police Department unit. (See attached Affidavit of Officer James Mueller). As Officer Mueller made the turn, he could see Fenn jumping out of his vehicle and running, jumping over a chain-link fence into a yard. (See attached Affidavit of Officer James Mueller). Officer Mueller stopped his vehicle and ran around the front of the residence as Fenn was emerging from the backyard of another house. (See attached Affidavit of Officer James Mueller). Officer Mueller chased Fenn for 100 yards or more and then tackled him in the middle of the road. (See attached Affidavit of Officer James Mueller). Other officers arrived and handcuffed Fenn and placed him in a patrol unit. (See attached Affidavit of Officer James Mueller). Officer Mueller learned that Officer Ben Crawley had used mace to subdue Fenn because Fenn was kicking and yelling inside the patrol car. (See attached Affidavit of Officer James Mueller). He was then transported to the Pike County Jail. (See attached Affidavit of Officer James Mueller).

Fenn had plenty of opportunity to stop. (See attached Affidavit of Officer Michael Hughes). Officer Hughes and Officer Mueller were trying to slow him down and get him to stop, and he had ample opportunity to do so. (See attached Affidavit of Officer Michael Hughes). It was obvious that Officer Hughes and Officer Mueller were trying to get Fenn stopped, and he intentionally rammed several police cars in an attempt to evade officers. (See attached Affidavit of Officer Michael Hughes).

Officer Hughes was not present on the scene when Fenn was ultimately captured and arrested. (See attached Affidavit of Officer Michael Hughes). Officer Hughes did not, at any time, have any physical contact with Fenn. (See attached Affidavit of Officer Michael Hughes). At no point did Officer Hughes strike Fenn. (See attached Affidavit of Officer Michael Hughes). At no time did Officer Hughes use any OC pepper spray on Fenn. (See attached Affidavit of Officer Michael Hughes). At no time did Officer Hughes exert any unreasonable force on Fenn. (See attached Affidavit of Officer Michael Hughes). Fenn was attempting to flee from officers and posed a threat to himself and officers. (See attached Affidavit of Officer Michael Hughes). Fenn evaded police for over an hour before he was finally arrested. (See attached Affidavit of Officer Michael Hughes). At least nine law enforcement officers were involved in the search and pursuit of Fenn. (See attached Affidavit of Officer Michael Hughes).

At no time did Officer Mueller strike Fenn. (See attached Affidavit of Officer James Mueller). At no time did Officer Mueller use any OC pepper spray on Fenn. (See attached

Affidavit of Officer James Mueller). Officer Mueller only used that amount of force which was necessary to subdue Fenn and gain control of the situation. (See attached Affidavit of Officer James Mueller). Force was necessary to subdue Fenn because he posed a threat to himself and officers. (See attached Affidavit of Officer James Mueller).

IV. Plaintiff's Allegations and Defendants' Response

Ground One: The Plaintiff alleges "police brutality", stating "[a]s I turn [sic] myself in to officers Mike Huges [sic] and Jim Mueller of the City of Troy. This is when the brutality started." (See complaint pg. 2). Although the Plaintiff lists "police brutality" as two separate grounds, it appears from the Complaint that Plaintiff brings one claim for excessive force which is more fully set out in Ground Two.

Ground Two: The Plaintiff alleges "police brutality", stating that after he was detained and placed in the back of a police car, "Officers Mike Hughes and Jim Mueller reopened Pike County Deputy car door and sprayed a whole can of O.C.C. [sic] pepper spray into my mouth." (See Complaint pg. 3).

V. Analysis of Applicable Law

A. Heck v. Humphrey

The United States Supreme Court, in Heck v. Humphrey, 512 U.S. 477 (1994), held that "a state prisoner's claim for damages is not cognizable under 42 U.S.C. § 1983 if a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence, unless the prisoner can demonstrate that the conviction or sentence has previously been invalidated." Edwards v. Balisok, 520 U.S. 641, 643 (1997)(citing Heck v. Humphrey, 512 U.S. at 487)(internal quotations omitted).

In his Complaint, the Plaintiff demands that charges for Assault in the Second Degree be dropped. However, on April 26, 2005, the Plaintiff entered a guilty plea, was found guilty, and was sentenced for two counts of Assault in the Second Degree for ramming the Defendants' police cars during his attempt to evade law enforcement. (See attached Sentence Order dated April 26, 2005). There is no evidence, nor can there be, that Plaintiff's convictions for Assault in the Second Degree have been invalidated. Thus, the Plaintiff's requested relief under § 1983 is unavailable under Heck.

B. Fourth and Fourteenth Amendment Analysis

This Court recently held that "[t]he first line of inquiry in analyzing a § 1983 excessive force claim is to identify the specific constitutional right allegedly infringed by the challenged application of force. Calhoun v. Thomas, 2005 WL 646803 (M.D. Ala. 2005)(Thompson, J.)(referencing Graham v. Connor, 490 U.S. 386, 394 (1989).

> The Fourth Amendment prohibition against unreasonable seizures of the person, the Fourteenth Amendment due process clause, and the Eighth Amendment ban on cruel and unusual punishment all protect an individual's personal security; the plaintiff's status as a person undergoing seizure, a pretrial detainee, or a convicted person determines which constitutional protection is afforded.

Calhoun v. Thomas, 2005 WL 646803 (M.D. Ala. 2005)(Thompson, J.). In the case at bar, the plaintiff was not a convicted person so his claim of excessive force is examined under either the Fourth or Fourteenth Amendment. Judge Thompson noted that "the standards used to evaluate excessive force claims under the Fourth and Fourteenth Amendments differ." Id. "The Fourteenth Amendment Due Process Clause protects pretrial detainees from the use of excessive force that amounts to punishment." Id. Claims of excessive force during an arrest or seizure are viewed under a Fourth Amendment reasonableness standard. See Id.

i. Fourteenth Amendment

The Defendants submit that the Plaintiff's claims are properly analyzed under the Fourteenth Amendment. In Riley v. Dorton, 115 F.3d 1159 (4th Cir.1997), the Fourth Circuit held that excessive force claims of pretrial detainees should be analyzed under the Fourteenth Amendment. The Fourth Circuit noted that Justice Ginsberg in Albright v. Oliver, 510 U.S. 266 (1994):

> wrote separately to argue that the concept of a "continuing seizure" justified applying the Fourth Amendment beyond the point of arrest. She contended that the seizure of a person, as contemplated by the Fourth Amendment, does not end after arrest, but continues as long as the person is "seized" (either in custody or on bail) by the government. Justice Ginsberg therefore concluded that Fourth Amendment protections should extend to the end of trial.

Riley v. Dorton, 115 F.3d at 1162. However, the Fourth Circuit refused to adopt Justice Ginsberg's theory of continuing seizure noting that the United States Supreme Court had previously held that "a seizure is a single act, and not a continuous fact." Id. at 1163 (citing California v. Hodari D. 499 U.S. 621, 625 (1991)). The Fourth Circuit went on to note that:

> Several of our sister circuits likewise have declined to adopt the "continuing seizure" concept and continued to apply the Fourteenth Amendment framework of Bell v. Wolfish, [441 U.S. 520 (1979)]rather than the Fourth Amendment to excessive force claims of pretrial detainees. …the Eleventh Circuit likewise recently reconfirmed that "claims involving the mistreatment of arrestees or pretrial detainees in custody are governed by the Fourteenth Amendment's due process clause. …Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir.1996). …In sum, we agree with the Fifth, Seventh, and Eleventh Circuits that the Fourteenth Amendment does not embrace a theory of "continuing seizure" and does not extend to the alleged mistreatment of arrestees or pretrial detainees in custody.

Id. at 1163-1164. (Internal citations and quotations omitted).

The Fourth Circuit noted that the Fourteenth Amendment seeks:

> [to] balance the rights of prisoners and pretrial detainees against the problems created for officials by the custodial context. The management by a few guards of large numbers of prisoners, not usually the most gentle or tractable of men and women, accurately depicts the tensions inherent and custodial settings, be they pretrial or post-conviction and the management of a single truculent individual may cause difficulties for a custodian as well. The Eighth and Fourteenth Amendments thus establish only qualified standards of protection for prisoners and pretrial detainees – against cruel and unusual punishment and against excessive force that amounts to punishment respectively. Thus, inherent in the Eighth and Fourteenth Amendments is the principle that: not every malevolent touch by a prison guard gives rise to a federal cause of action. To permit those in custody to bring excessive force claims without any showing of injury would violate that very principle. …Punishment must mean something more than trifling injury or negligible force. Otherwise, every touch would be actionable and every alleged push or shove would entitle plaintiff to a trial. This is no idle concern. Those in detention often detest those charged with supervising their confinement, and seek to even the score through the medium of a lawsuit. The Constitution, however, does not exist to scoop up every last speck of detainee discontent. To hold the every incident involving contact between an officer and a detainee creates a constitutional action, even in the absence of injury, trivializes the nation's fundamental document. …Without a *de minimus* threshold, every least touching of a pretrial detainee would give rise to a Section 1983 action under the Fourteenth Amendment. Not only would such a rule swamp the federal courts with questionable excessive force claims, it would also constitute an unwarranted assumption of the federal judicial authority to scrutinize the minutia of state detention activities. The *de minimus* rule thus serves the interest of our federal system by distinguishing claims which are cognizable under the Constitution from those which are solely within the jurisdiction of state courts. An injury need not be severe or permanent to be actionable under the Eighth Amendment, but it must be more than *de minimus*. We think the same rule applies to excessive force claims brought by pretrial detainees.

Id. at 1166-1167. (Internal citations and quotations omitted).

In the present case, the Plaintiff was already seized at the time he claims the alleged excessive force was used. He claims that the officers used excessive force on him after he had been captured and placed in the back of a police car for transport to jail. Because the Plaintiff was in police custody at the time he claims to have suffered a constitutional violation, the Fourteenth Amendment standard governs his claim of excessive force.

Under the Fourteenth Amendment analysis, the Plaintiff fails to establish a constitutional violation. There is no evidence that Officer Hughes or Officer Mueller applied excessive force maliciously or sadistically to cause harm to the Plaintiff. See Eleventh Circuit Pattern Jury Instruction (Civil 2.4.1). Accordingly, the Plaintiff's claim must fail.

ii. Fourth Amendment Analysis

Even if this Court finds that a Fourth Amendment Analysis is appropriate, the Plaintiff still cannot establish a constitutional violation. In order to determine whether the Plaintiff's Fourth Amendment constitutional right to be free from unreasonable seizure was violated, the Court must determine whether the Officers' "actions were 'objectively reasonable' in light of the totality of the circumstances confronting them, without regard to their underlying intent or motivation." Id. Further, "[t]he reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Graham v. Connor, 490 U.S. 386, 396 (1989). Importantly, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation." Garrett v. Athens-Clark County, Georgia, 378 F.3d 1274, 1279 (11th Cir. 2004).

Further, the Eleventh Circuit has held that "the application of *de minimus* force, without more, will not support a claim for excessive force in violation of the Fourth Amendment." Nolin v. Isbell, 207 F.3d 1253, 1257 (11th Cir. 2000). Indeed, in analyzing Fourth Amendment excessive-force claims, this Court should "look at the totality of the circumstances, including the severity of the crime at issue, *whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight*." Garrett v. Athens-Clark County, Georgia, 378 F.3d at 1279(emphasis added). Indeed, "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." Graham v. Connor, 490 U.S. at 396.

In Garrett v. Athens-Clark County, Georgia, 378 F.3d 1274 (11th Cir. 2004), the mother of an arrestee filed suit against police officers who subdued her son with chemical spray and fettered him during the course of his arrest, resulting in his death from positional asphyxia. The district court, which referred to the method of restraint used by the officers as hog-tying, denied the officers' motion for summary judgment on claims of excessive force under the Fourth Amendment. The Eleventh Circuit reversed the denial of summary judgment holding that the officers did not violate the decedent's Fourth Amendment constitutional rights when they subdued him with chemical spray and fettered him by tying his wrists close to his ankles. The Eleventh Circuit noted that "Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." Id. The Court analyzed "whether the defendants used excessive force by determining whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them." Id.

The plaintiff in Garrett argued to the Court that fettering constituted excessive force because the arrestee had been subdued through the use of chemical spray. The Eleventh Circuit rejected this argument holding "[i]n analyzing whether excessive force was used, courts must look at the totality of the circumstances: not just a small slice of the acts that happened at the tail of the story." Id. Thus, the Court held that fettering the arrestee was "within the range of reasonably proportionate responses to the need for force and was not excessive." Id. The Court went on to hold that the officers "took advantage of a window of opportunity-of unknown duration-to restrain [the arrestee] in such a way that he could not harm another officer or himself." Id.

In the case at bar, the plaintiff had been arrested after a prolonged chase by law enforcement. The plaintiff evaded law enforcement officers for over an hour, rammed the Defendants' police cars in an attempt to escape capture, and had stolen a vehicle to aid in his get-away. The plaintiff had been threatening and aggressive towards Defendants. In fact, he disabled Officer Hughes' vehicle by ramming it with the van the Plaintiff had stolen. The Officers used that amount of force which was necessary to subdue the plaintiff and gain control of the situation. Under the reasonableness standard of the Fourth Amendment analysis, the actions of the Officers were reasonable and indeed appropriate in the circumstances in order to restore order to an escalating situation.

The Officers simply exerted that amount of force which was necessary to restore order; for Fenn's protection and the protection of the Officers. As such, Fenn fails to identify any deprivation by the Officers of his Fourth Amendment rights to be free from excessive force.

iii. Personal Participation Required for § 1983 Claim

A Montgomery federal court held that "the plaintiff must establish an affirmative causal connection between the act or omission complained of and the alleged constitutional deprivations in order to sustain a § 1983 cause of action against the defendant." Ludlam v. Coffee County, 993 F.Supp. 1421 (M.D. Ala. 1998). There is no causal link between the alleged use of force and Officer Hughes or Officer Mueller. Neither of these two officers used OC pepper spray on the Plaintiff. Accordingly, plaintiff fails to meet the standard by which a § 1983 claim can be sustained against the Defendants.

VII. Immunity

Defendants are entitled to immunity in both their official and individual capacities; this analysis addresses Defendants' immunity in both capacities. The Officers are entitled to absolute immunity, discretionary function immunity, and state agent immunity from any state law claims that the Plaintiff may have asserted against them[1].

A. Discretionary Function Immunity and § 6-5-338 (1975) Immunity

Further, the Officers are entitled to discretionary function immunity. Under Alabama statutory law "every peace officer, … whether appointed or employed as such peace officer by the state or county *or municipality thereof*… shall at all times be deemed to be officers of this state, and as such shall have immunity from tort liability arising out of his or her conduct in performance of any discretionary function within the line and scope of his or her law enforcement." Alabama Code § 6-5-338 (a)(1975)(emphasis added). The Eleventh Circuit recognized that "[i]n Alabama, law enforcement officials,…enjoy statutory immunity from suit for performance of any discretionary function within the line and scope of his or her law enforcement duties." Wood v. Kesler, 323 F.3d 872, 883 (11th Cir. 2003)(citing Ala. Code § 6-5-338)(internal quotations omitted). The Court further explained that "[u]nder discretionary-function-immunity analysis, a court first determines whether the government defendant was performing a discretionary function when the alleged wrong occurred; if so, the burden shifts to

[1] In his Complaint, the Plaintiff alleges "police brutality". It is unclear from the allegations whether Plaintiff alleges only excessive force in violation of the Fourth Amendment or state law claims as well. Out of an abundance of caution, the Defendants address the immunity to which they are entitled to the extent that any state law claims are alleged.

the plaintiff to demonstrate that the defendant[] acted in bad faith, with malice or willfulness in order to deny [him] immunity." Wood v. Kesler, 323 F.3d at 883.

> Discretionary acts are those acts as to which there is no hard and fast rule as to the course of conduct that one must or must or must no take and those acts requiring exercise in judgment and choice and involving what is just and proper under the circumstances.

Id. At 883-84.

In the case at bar, the Officers were engaged in discretionary acts when pursuing the Plaintiff who evaded law enforcement officers for over an hour, fled on foot through a residential neighborhood, stole a vehicle, and rammed police cars. The Plaintiff was accordingly aggressive and threatening to officers, citizens, and himself. The Officers determined that the use of force was necessary to subdue the Plaintiff and exerted only that amount of force which was necessary to restore order. Further, the Officers restrained the Plaintiff in an effort to ensure his own safety and the safety of others. In any event, the conduct complained of by the Plaintiff did not involve either Officer Hughes or Officer Mueller. The Plaintiff had disabled Officer Hughes' vehicle during the pursuit and, thus, Officer Hughes was not present on the scene when the Plaintiff was finally apprehended. Further, Officer Mueller only tackled the Plaintiff in order to capture him and had no contact with the Plaintiff after he was handcuffed. Accordingly, the Officers are entitled to discretionary function immunity.

B. State Agent Immunity

The Officers are entitled to State Agent immunity pursuant to Ex parte Cranman, 792 So.2d 392 (Ala. 2000). Pursuant to Cranman,

> A State agent shall be immune from civil liability in his or her personal capacity when the conduct made the basis of the claim against the agent is based up the agent's (1) formulating plans, policies, or designs; or (2) exercising his or her judgment in the administration of a department or agency of government,

> including, but not limited to, examples such as: (a)making administrative adjudications; (b) allocating resources; (c) negotiating contracts; (d) hiring, firing, transferring, assigning, or supervising personnel; or (3) discharging duties imposed on a department or agency by statute, rule, or regulation insofar as the statute, rule, or regulation prescribes the manner for performing the duties and the State agent performs the duties in that manner; or (4) *exercising judgment in the enforcement of the criminal laws of the State, including, but not limited to, law-enforcement officers' arresting or attempting to arrest persons*; or (5) exercising judgment in the discharge of duties imposed by statute, rule, or regulation in releasing prisoners, counseling or releasing persons of unsound mind, or educating students.

Ex parte Cranman, 792 So.2d at 405(emphasis added). Because the Officers were engaged in exercising their judgment relating to their duties as law enforcement officers at all material times hereto, they are immune from civil liability in their individual capacities. Accordingly, summary judgment is due to be granted.

C. Absolute Immunity

The Officers are entitled to immunity under Article I § 14 of the Alabama Constitution of 1901. "When Article I, § 14 Alabama Constitution of 1901, has been violated, a trial court is without jurisdiction to entertain the action and the action must be dismissed." Sholas Community College v. Colagross, 674 So.2d 1311 (Ala. Civ. App. 1995). The Alabama Constitution mandates that "the State and its agencies have absolute immunity from suit in any court." Id. (citing Phillips v. Thomas, 555 So.2d 81, 83 (Ala. 1989)). State officers "in their official capacities and individually, are also absolutely immune from suit when the action is, in effect, one against the state." Colagross, 674 So.2d at 1313 to 1314 (citing Phillips v. Thomas, 555 So.2d at 83). Because the action against the Officers is an action against the state, summary judgment is due to be granted to them with respect to any state law claims pursuant to Article I, § 14 of the Alabama Constitution of 1901.

D. Official Capacity Immunity

The United States Supreme Court has held that "a state is not a person within the meaning of § 1983." Will v. Michigan Depart. Of State Police, 491 U.S. 58 (1989). The Court has further held that "§ 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a state for alleged deprivations of civil liberties." Id. The court went on to note that "suit against a state official in her or her official capacity is not a suit against the official but rather is a suit against the officials office." Id. The Court, therefore, held that "neither a state nor its officials acting in their official capacities are persons under § 1983." Id. Because Defendants, Officer Mueller and Officer Hughes are State Officials acting in their official capacities, they are not subject to liability pursuant to § 1983.

There was no deliberate indifference by the Defendants. The individual defendants are State Officials acting in good faith and are immune from suit under Article I, § 14 of the Alabama Constitution of 1901 and in accordance with the doctrine of good faith immunity.

E. Substantive Immunity

The Alabama Supreme Court has held that the "doctrine of substantive immunity may yet be invoked if the official or employee (1) is engaged in the exercise of a discretionary function; (2) is privileged and does not exceed or abuse the privilege; or (3) is not negligent in his responsibility." DeStafney v. University of Alabama, 413 So.2d 391 (Alabama 1981). The Alabama Supreme Court has further noted that state officers or employees are entitled to substantive immunity "if they were engaged in the exercise of a discretionary function." Nance by and through Nance v. Matthews, 622 So.2d 297 (Ala. 1993). The Court noted that Black's Law Dictionary defines discretionary acts as "those acts [as to which] there is no hard and fast rule as to course of conduct that one must or must not take and, if there is [a] clearly defined rule, such would eliminate discretion…one which requires exercise in judgment and choice and involves what is just and proper under the circumstances." Id. (citing Black's Law Dictionary 419 (5th Ed. 1979)). Defendants acted within their discretion when pursuing the Plaintiff, who evaded law enforcement officials for a lengthy period of time.

VII. Conclusion

The Plaintiff demands compensatory and punitive damages and demands that charges for Assault in the Second Degree, for which he has already been convicted, be dropped. Plaintiff has failed to prove any constitutional deprivation and has failed to set forth any evidence of wrongdoing by Officer Hughes or Officer Mueller for which relief can be granted.

VIII. Motion for Summary Judgment

The Defendants respectfully request this Honorable Court to treat their Special Report as a Motion for Summary Judgment and grant the same unto them.

Respectfully submitted this 24th day of August, 2005.

/s/ C. Winston Sheehan, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 2005, I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF system. The following person, not registered with the CM/ECF system, was served by U.S. mail:

Mr. Johnny C. Fenn, Jr. (#238558)
Bullock Correctional Facility
Post Office Box 5107
Union Springs, AL 36089

by placing same in the U.S. mail postage prepaid on this the 24th day of August, 2005.

__/s/ C. Winston Sheehan, Jr.____________
OF COUNSEL